

## **EXHIBIT B**

CIVIL NO. 03-00385 SOM-LEK  
DEFENDANT'S EXHIBIT 291  
IN EVIDENCE - FOR IDENTIFICATION  
REC'D \_\_\_\_\_, 2006.  
\_\_\_\_\_  
CLERK

***Wayne Berry***

***V***

***Hawaiian Express Service***

**Jeffrey H. Kinrich  
Analysis Group, Inc.**

## **Summary of Opinions**

- **Mr. Ueno's inflated "reasonable license fee" contains factual and conceptual errors**
- **Fleming Hawaii has little or no profits to disgorge**
  - **Fleming Hawaii lost \$861,478**
  - **Fleming Hawaii reduced its losses post-infringement**
  - **FCS generated little or no cost savings for Fleming**
- **Mr. Berry's direct damages are no more than \$16,800**

# Mr. Ueno's "Reasonable License Fee" Per Container Calculation

Mr. Ueno's "reasonable license fee" per container =

$$\begin{array}{r} \text{"Fleming Acknowledged} \\ \text{Fee"} \\ \$1,295,000 \end{array} \bigg/ \begin{array}{r} \text{\# of Containers Processed} \\ \text{Between 10/9/99 and 1/10/00} \\ 731 \end{array}$$



Mr. Ueno misstates facts  
in using this number

Mr. Ueno makes arbitrary  
assumptions in coming  
up with this number

## **Mr. Ueno's "Reasonable License Fee" Per Container Calculation**

- Mr. Ueno bases his "reasonable license fee" per container on:
  - Fee allegedly paid by Fleming to license FCS software
  - Period of time that license fee allegedly covered

**BOTH OF THESE ITEMS  
ARE BASED ON FAULTY  
ASSUMPTIONS**

## **“Fleming Acknowledged Fee” Used by Mr. Ueno Has Nothing to Do with the FCS**

- What does the \$1,295,000 fee used by Mr. Ueno represent?
  - Fleming forgave its uncollectible note against API
  - API forgave offsetting claims it had against Fleming
  - API could not pay the \$1,295,000 it owed Fleming
    - Value of the note less than \$1,295,000
  - Fleming purchased all of API's assets except for the FCS
  - Fleming received a free license from Mr. Berry for the FCS
- Mr. Berry received no money from Fleming
- Fleming never paid a license fee for the FCS

## **Mr. Ueno's Calculation of the Number of Containers Processed by Fleming is Arbitrary**

- Why does Mr. Ueno use the time period of 10/9/99 – 1/10/00 in his “reasonable license fee” calculation?:
  - Assumes Fleming stops using the FCS by 1/10/00 but...
    - Several documents contradict assertion
    - Fleming had a free license to use the FCS
  - Extending time period would reduce the “reasonable license fee”
    - BUT: Fleming’s free license had no end date



## **Other Conceptual Problems with Mr. Ueno's "Reasonable License Fee" Calculation**

- Mr. Ueno calculates the wrong license fee:
  - Calculated based on value of the entire FCS
  - Should only be related to the infringing portion
    - Fleming had free license to use the unaltered FCS
- Logistics software not priced per container
- Not the way logistics software is purchased
- Mr. Berry's other logistics software not licensed in this way

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## **Other Conceptual Problems with Mr. Ueno's "Reasonable License Fee" Calculation (Cont.)**

- **Mr. Ueno's results are unreasonable:**
  - **Implies Fleming would pay approximately \$100,000 per week for the FCS**
  - **Mr. Berry offered to sell entire FCS software for \$300,000**
    - **Fleming turned him down and received a free license**
  - **Mr. Berry sold a license for superior FCS software to Y. Hata for \$150,000**



## **Fleming Hawaii Lost Money During the Infringement Period**

### **Fleming Hawaii Financial Performance** *April 1, 2003 – June 8, 2003*

<b>Net Sales</b>	<b>\$54,435,793</b>
<b>Gross Margin</b>	<b>707,409</b>
<b>Less: SG&amp;A</b>	<b><u>504,877</u></b>
<b>Operating Income</b>	<b>202,533</b>
<b>Less: Other Expenses</b>	<b><u>1,064,011</u></b>
<b>Net Income</b>	<b>-\$861,478</b>

# **Fleming Hawaii Lost Money During the Infringement Period**

## **Fleming Hawaii Financial Performance** *April 1, 2003 – June 8, 2003*

<b>Net Sales</b>	<b>\$54,435,793</b>
<b>Less: Cost of Goods Sold</b>	<b><u>53,728,383</u></b>
<b>Gross Margin</b>	<b>707,409</b>
<b>Less: SG&amp;A</b>	<b><u>504,877</u></b>
<b>Operating Income</b>	<b>202,533</b>
<b>Less: Other Expenses</b>	<b><u>1,064,011</u></b>
<b>Net Income</b>	<b>-\$861,478</b>

## **Fleming Hawaii's Performance Improved After Use of FCS Ceased**

### **Comparison of Fleming Financial Performance**

	<b>Infringing <u>4/1/03 – 6/8/03</u></b>	<b>Non-Infringing <u>6/9/03 – 8/23/03</u></b>
<b>Net Loss</b>	<b>\$861,478</b>	<b>\$343,196</b>
<b># of Days</b>	<b>69</b>	<b>76</b>
<b>Loss per Day</b>	<b>\$12,485</b>	<b>\$4,516</b>



## **Even if Fleming Did Have Profits, They are not Attributable to the FCS Software**

- Cost savings generated through know-how of the  
staff
- Fleming still able to save on costs without using the FCS  
software

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## **Fleming's Costs Increased Slightly After Abandoning the FCS Software**

- Fleming hired a clerk @ \$25,000/year total cost
- Infringing period < 1/5 of a year
- Total cost savings to Fleming < \$5,000

## **Actual Damages Suffered by Mr. Berry**

- How was Berry damaged?
- “I knew that Fleming would have to come to me to make changes to my work.” (Declaration of Wayne Berry, 9/13/05, p. 8)
- By changing FCS, Fleming denied Mr. Berry compensation
- Mr. Berry’s damages equal his fee to modify FCS



## **Actual Damages Suffered by Mr. Berry**

**Total Hours Required to Make  
Modifications**

**X**

**Mr. Berry's Hourly Rate**

**=**

**Total Cost to Modify the FCS software**

## Actual Damages Suffered by Mr. Berry

### Estimate of Total Hours Required to Make Modifications

	Number of Hours	
	Low	High
Removal of Extraneous Tables	32	40
Addition of Vendor Defaults	32	40
Standardization of Forms	32	32
Alteration of Accounts Receivable Payment Form	24	24
Modification of Tab Orders	8	16
<i>Ad Hoc</i> Changes	8	16
Total Hours Needed	136	168

## **Actual Damages Suffered by Mr. Berry**

- Determination of Mr. Berry's hourly rate
- Mr. Berry told Y. Hata he charges \$100/hr.
- Fleming received \$90/hr. quote from application developer
- \$100/hr. reasonable rate for Mr. Berry to modify FCS

## Actual Damages Suffered by Mr. Berry

	<u>Low</u>	<u>High</u>
Total Hours Required to Make Modifications	136	168
X		
Mr. Berry's Hourly Rate	\$100	\$100
=		
Total Cost to Modify the FCS software	\$13,600	\$16,800

## **Summary**

- Fleming Hawaii's profits attributable to infringing use of the FCS are between \$0 and \$5,000
- Mr. Berry's direct damages are between \$13,600 and \$16,800